

OIP GUIDANCE: ADJUDICATING ADMINISTRATIVE APPEALS UNDER THE FOIA

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The Freedom of Information Act (FOIA) provides requesters with a statutory right to administratively appeal an “adverse determination” an agency makes on a FOIA request. See 5 U.S.C. § 552(a)(6)(A) (i) (2012 & Supp. V 2017). Adverse determinations, or denials of requests, include agency decisions that the requested records are exempt, in whole or in part, as well as determinations that the requested record does not exist or cannot be located. Adverse determinations can also encompass procedural matters associated with a request, such as decisions on fee waiver or expedited processing, or the form or format of the requested records. See, e.g., Department of Justice FOIA Regulations, 28 C.F.R. § 16.6(d) (2018).

The administrative appeal process affords benefits to agencies as well as to requesters. The process offers the agency an opportunity to reevaluate its initial response to a request and identify any potential legal errors, and it increases requesters’ confidence in the FOIA process by providing a second opportunity for the request to be reviewed. This guidance outlines key considerations for agencies to employ in implementing a strong and effective administrative appeal process.

Setting Out Appeal Procedures in FOIA Regulations

While the FOIA requires agencies to give requesters an opportunity to administratively appeal adverse determinations made on their requests, 5 U.S.C. § 552(a)(6)(A)(i), the statute does not explicitly require agencies to set out in their FOIA regulations specific procedures for the filing and handling of administrative appeals. Nevertheless, OIP’s guidance on agency FOIA regulations stresses that including appeal procedures in agency FOIA regulations ensures that both agency personnel and requesters understand how and where to make their appeal and what to expect from the appeal process. See [OIP Guidance for Agency FOIA Regulations](#) (posted 2016, updated 7/11/2017). As to the amount of time within which to file an appeal, the statute specifies that agencies must afford requesters a minimum of 90 days after the date of an adverse determination to file an administrative appeal. 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

OIP’s [template](#) for agency FOIA regulations includes suggested language for administrative appeal procedures that address the mechanics of submitting an appeal, delineate what is required in an agency response on appeal, and address customer service. It is helpful, for example, to include in agency FOIA regulations a statement advising the public that an appeal ordinarily is required before a requester can seek judicial review, and conversely, that an appeal ordinarily will not be adjudicated if the request becomes the subject of litigation.

Absent “unusual circumstances,” the FOIA provides that agencies should make a determination with respect to an appeal within twenty working-days of its receipt by the agency. 5 U.S.C. § 552(a)(6)(A)(ii). If a denial of the request for records is upheld either in whole or in part on appeal, the FOIA requires the agency to notify the requester of the FOIA’s provisions for judicial review. *Id.* OIP guidance instructs agencies to also include in their appeal determinations notification of the availability of mediation services offered by the Office of Government Information Services (OGIS), at NARA, as a non-exclusive alternative to litigation. See [OIP Guidance: Notifying Requesters of the Mediation Services Offered by OGIS](#) (posted 7/9/2010).

Conducting an Independent, “De Novo” Review on Appeal

The administrative appeal process serves an important screening function by providing agencies with “an opportunity to exercise [their] discretion and expertise on the matter” and “to correct mistakes made at lower levels and thereby obviate[] unnecessary judicial review.” *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990). To maximize the effectiveness of this responsibility, agencies should ensure that administrative review is conducted by an appeal authority that is separate and distinct from the office or official that made the initial determination on the request.

Moreover, given that FOIA decisions are generally reviewed under the “de novo” standard in court, see 5 U.S.C. § 552(a)(4)(B),—meaning that for most matters the court will review the agency’s actions afresh—it is beneficial for agencies to use this same standard of review at the administrative appeal level as well. Employing a “de novo” standard of review at the administrative appeal level helps ensure that the agency is making a fully considered decision on appeal. Appeals analysts should review the initial decision, taking into account any arguments or facts presented by the requester and looking for any relevant information that may have been missed or applied incorrectly.

Engaging with FOIA Professionals & Reinforcing Sound FOIA Processing Practices

While review must remain independent, appeals analysts should freely engage with the FOIA professionals who initially handled the request, asking questions and seeking clarification on any aspect of its handling. At the conclusion of their review, appeals analysts should thoroughly communicate their eventual findings to the agency’s initial review staff. This process facilitates the development of a “feedback loop,” which ensures greater consistency and fewer repetitive appeals in the future.

Indeed, the administrative appeals process can serve as an important reinforcement of sound agency processing procedures. For example, when appeals analysts are evaluating the sufficiency of the agency's search, they will examine the search terms that were used and the records systems queried to assess whether the agency conducted a reasonable search for the requested records. In order to do so, it will be vital that the request file contain those necessary details about how the search was conducted. Similarly, if the FOIA professional had discussed the scope of the request with the requester, it will be important that those discussions are memorialized in the case file. The appellate review process will reinforce the importance of maintaining all key details about the handling of the request in the case file. To the extent additional information is needed, appeals analysts should supplement the FOIA case processing file with any additional findings or pertinent facts.

Ensuring an Adequate Administrative Record for Fee Waiver & Expedited Processing Decisions

There are two agency determinations made under the FOIA where the statute provides that any judicial challenge made by the requester will be reviewed by a court based on the record before the agency. Specifically, a court's review of any challenge to an agency's decision on a request for a waiver of fees is determined "de novo," but the court's review of the matter is "limited to the record before the agency." 5 U.S.C. § 552(a)(6)(E)(iii). Second, court review of an agency decision on a request for expedited processing is "based on the record before the agency at the time of the determination." *Id.* § 552(a)(4)(A)(vii).

In reviewing such decisions on administrative appeal, it will be very important for the appellate authority to review not just the substance of the decision, but also the documentation of the reasons underlying it. To the extent the existing record at the initial request level is incomplete or not as clear as it could be, a more complete, thorough explanation can be provided at the administrative appeal level. The appeals authority should be mindful that if the agency's action on a fee waiver or expedited processing request is challenged in court, the FOIA provides that review will be based on the administrative record and so the appeals authority has the last, best chance to ensure that that record is comprehensive and clear.

Communicating Effectively with the Requester

Just as they do at the initial request level, agencies should be proactive in contacting requesters whenever doing so can facilitate the effective adjudication of an appeal. Such contact can help to focus the issues raised on appeal. Engagement can also serve a vital role in bridging information gaps or clarifying the agency's initial response. The requester may have questions about the underlying response, or the FOIA process more broadly, and those questions can sometimes be more effectively or easily addressed through informal communication with the requester. Such engagement may entirely resolve, or may narrow, the appeal. Critically, such engagement can also go a long way toward increasing public understanding of the FOIA more broadly and as it was specifically applied in the requester's case.

Upon review by the appellate authority, the action taken at the initial level can be affirmed, reversed, remanded, or a combination of those actions. For example, an appeal authority may affirm in its entirety the action taken at the initial request level. The appeal authority may also affirm the underlying action, such as the withholding of particular information, but may do so based on a different exemption. In such a case the appeal would be affirmed on modified grounds. In other cases, the appeal authority may determine that additional information is appropriate for release, but the remaining information is correctly protected. In those cases, the appeal would be affirmed in part. As to the information that is determined to be releasable by the appeals analyst, whenever possible it should be provided to the requester as a supplemental release accompanying the appeal determination. Doing so, rather than remanding the request, is preferable when it is more efficient and results in more timely access to the material.

In the event more time is needed to, for example, re-process certain of the records or to conduct a further search, the appeal will be remanded in part so that those actions can occur, with the remaining portions affirmed. Lastly, in some situations an appeal can result in a complete reversal of the determination that was made at the initial request level. That can happen, for example, when facts change during the time between the initial response and the administrative appeal, or when the requester provides information on appeal that was not provided at the initial request level, which changes the exemption analysis. As with any other appeal determination, if it is possible to correct the handling of the request at the appeal stage, the appeals analyst should do so, rather than remanding it, in order to more efficiently resolve the appeal.

The decision on appeal typically addresses the applicability of FOIA exemptions that were asserted at the initial request stage. Administrative appeals are not limited to exemption usage though and, as discussed above, can arise when a requester challenges a "no records" response or a fee waiver or expedited processing decision. The appeals analyst will conduct an independent review of whatever aspect of the initial response is challenged on appeal.

Once the appeals authority has completed its review and a determination has been reached, the appeals analyst should clearly communicate that determination to the requester in writing. If affirming the initial action taken, the appeals authority should explain why the initial action was proper. If the initial action is reversed or remanded, the response should explain the next steps in the process, such as a timeframe for the remand and a point of contact for the request on remand. Importantly, if there is any added context or clarification that would help the requester understand the agency's initial action, adding even a sentence or two of tailored language to the determination can greatly assist the requester's understanding. For example, a requester may believe that the agency would maintain certain records or may question why certain records are not made available under the FOIA. Taking the time to briefly explain where the

requested records are more likely to be maintained, or why particular information is exempt from access, will enhance the effectiveness and usefulness of the appeal process.

In responding to appeals, agencies should take steps to ensure consistency in their responses to similar issues. A repository with uniform language to respond to various subsets of issues on appeal is a useful way to enhance consistency in responses. Such a repository can also improve response efficiency as appeals analysts can use the repository in crafting their response, freeing them to focus on tailoring existing language to the specifics of each new appeal. Quality in appeal responses is also improved by continually reviewing and refining the language repository to keep it up-to-date and as clear and comprehensive as possible.

Offering the Option to Appeal Interim Responses

OIP has long encouraged agencies to make interim responses when FOIA requests involve voluminous records or time-consuming steps in processing. See [OIP Guidance: The Importance of Good Communication with FOIA Requesters](#) (posted 3/1/2010); [OIP Guidance and Suggested Best Practices for Improving Transparency](#) (posted 9/1/2010). By making rolling releases as records are processed, rather than waiting for all the processing to be completed, agencies will facilitate access to the requested information. Requesters may also find that after one or two interim releases, their information needs are met and further processing will not be necessary. Requesters may also refine what they are seeking once they have an initial batch of records to review. For all these reasons, agencies should make interim releases when possible.

Consistent with that approach, agencies should likewise offer the requester the opportunity to appeal the initial determinations that are made on each successive interim release, rather than waiting until all releases are made and appealing once. If a requester chooses to appeal as each interim release is made, the agency can identify any issues that may impact subsequent processing of the remaining records. Similarly, an explanation provided in response to an interim release may address a question the requester has and obviate the need to file subsequent appeals. While agencies should provide the opportunity to appeal each interim response, it is important to note that the requester does not lose the ability to raise an issue from an earlier interim response if he or she does not appeal at that time. After the final determination is made on a request, the requester should have ninety days to file an appeal on any aspect of that request.

Consultations and Coordinations

When processing records in response to a request, agency FOIA professional sometimes must consult or coordinate with other agencies that also have equities in the records. See [OIP Guidance: Referrals, Consultations, and Coordination: Procedures for Processing Records When Another Agency or Entity Has an Interest in Them](#) (posted 12/5/2011). Consultations generally occur when an agency locates records in response to a request that originated with the agency, but which contain within them information of interest to another agency or component. In those situations, the agency processing the request consults with that other agency, or equity holder, to obtain its views prior to disclosure of the records. Similarly, an agency FOIA professional may need to coordinate the processing of records that originated with a law enforcement or intelligence agency when the records cannot otherwise be referred to those agencies because doing so would inadvertently reveal a sensitive fact.

In both situations, whether the agency is responding to the request after consulting or coordinating with another agency, it ordinarily remains responsible for reviewing those determinations upon receipt of an administrative appeal. (By contrast, when records are *referred* to another agency for handling and direct response to the requester, any appeal arising from those records will be handled by the agency that received the referral and made the disclosure decision.)

As to any records that involved consultations or coordination with another agency, the agency that received the request and provided the initial response should review the records on appeal. On appeal, the appeals analyst would, to the extent necessary, consult or coordinate again with the other agency that had equity in the records. What is key is that in these situations the agency that received the request and conveyed the original disclosure determination to the requester remains responsible for adjudicating any appeal of that action. This is particularly important for records that are the subject of coordination such that directing the requester to the other agency for purposes of an appeal would reveal the sensitive fact that the agency is attempting to protect.

Effectively Managing Administrative Appeals Dockets

In light of agencies' many competing priorities, managing time and allocating resources for administrative appeals can present significant challenges. While the ideal approach for appeals processing will vary with the size and structure of each agency, several useful management techniques can assist FOIA managers with streamlining the overall appeals workflow and effectuating quality appeal determinations.

Triage Appeals Based on Complexity and Expedited Processing

To increase processing efficiency, agencies that receive a high volume of appeals should consider organizing their administrative appeals dockets into multiple tracks based on their overall complexity and based on whether expedited processing was granted. Grouping appeals in this way increases both quality and efficiency in appeals processing by ensuring that otherwise straightforward issues on appeal do not become unnecessarily delayed behind more difficult questions.

An agency that processes a high volume of administrative appeals should consider utilizing three separate tracks: one track reserved for expedited appeals, one for simple appeals, and one for complex appeals. After separating out expedited appeals from the administrative appeals docket, appeals can be broken down further into either the “simple track” or the “complex track” based on each appeal’s level of complexity. Determining which of these two tracks is most appropriate can be based on many context-specific factors, including the breadth of the request’s scope, the number of applicable exemptions, the complexity of any applicable search issues, and the overall level of analytical difficulty. In general, simple track appeals can be reviewed by a single appeals analyst at a swifter pace, while complex track appeals tend to warrant extra processing time and additional layers of scrutiny.

Triage Appeals based on Subject Matter Expertise

Another effective strategy for streamlining larger administrative appeals dockets involves training individual appeals analysts to specialize in particular types of issues on appeal. Agencies can screen their dockets to identify common or recurring themes among administrative appeals and direct similar appeals toward subject matter experts who are well versed in adjudicating those issues. For instance, FOIA managers can triage appeals based on either the exemptions invoked at the initial request level or the subject matter of the appeal itself. Likewise, appeals that involve expedited processing or fee issues could be assigned to devoted subject matter experts. Continually working with discrete subsets of appeals issues in greater depth allows appeals analysts to become more adept at handling their designated areas of subject matter expertise.

Quality Control and Employee Oversight

Many agencies use licensed attorneys who are well versed in the FOIA’s law and policy to handle their administrative appeals. Regular training of appeals analysts is strongly encouraged, and managers should strive to identify specific areas for improvement where appeals analysts can benefit from additional training. Oversight and active management of the appeals caseload, with a focus on closing out the ten oldest administrative appeals each year, is also essential. OIP regularly provides FOIA trainings to help analysts and managers to develop and maintain this skillset.

Conclusion

Maximizing efficiency and quality when responding to FOIA administrative appeals is beneficial to requesters and agencies alike. Agencies should conduct an independent, “de novo” review of each appeal, should communicate effectively both with the FOIA professions who handle the initial response and with the requester. Agencies should also employ effective management techniques to organize their appeals dockets. Implementing these practices will help agencies effectively carry out their statutory responsibility to adjudicate administrative appeals under the FOIA.

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